

AMERICAN INTERNATIONAL ASSURANCE COMPANY LTD

a

v.

KARITHIKEYAN RAMALINGAM

HIGH COURT MALAYA, KUALA LUMPUR

b

FAIZA TAMBY CHIK J

[CIVIL APPEAL NO: R2-11-97-2002]

27 MARCH 2003

INSURANCE: *Life insurance - Duty of disclosure - Non-disclosure of other existing life policy by deceased - Whether failure to disclose a “material matter” - Whether appellant would have refused proposal form or imposed less favourable terms - Insurance Act 1963, s. 15C(4), (4A)*

c

INSURANCE: *Insurance clause - Limitation in policy - Exclusion clause in supplementary contract not covering hospitalisation charges incurred resulting from any pre-existing condition or illness - Whether exclusion clause applicable - Whether appellant liable for payment of hospitalisation charges*

d

This was an appeal by the appellant against the learned magistrate’s decision giving judgment in favour of the respondent for the sum of RM10,000, being the sum insured on a life policy issued to the deceased, the respondent’s son, and for RM13,545.39, being the medical expenses on a supplementary contract to the life insurance policy. The appellant raised two substantive defences: (i) that as the deceased did not disclose that he had already had a life insurance policy with Great Eastern Assurance Co. Bhd in the sum of RM25,000 in his proposal form, the appellant was not bound to pay the respondent; and (ii) that the exclusion clause in the supplementary contract did not cover hospitalisation charges incurred as a result of any pre-existing condition or illness, the symptoms of which first occurred prior to the issue date of this supplementary contract.

e

f

Held (dismissing the appeal):

g

[1] The proposal form was dated 29 October 1996 but the very first time the appellant questioned the policy on the ground that the deceased had another life policy for RM25,000 was when the appellant filed its defence on 5 August 1999, which was more than two years and nine months later. Therefore, by virtue of s. 15C(4) and (4A) of the Insurance Act 1963, the appellant had failed to prove that the deceased’s failure to disclose the existing life policy was a “material matter” ie, that if it had known that the statement was false, it would have refused the proposal form or would have imposed terms less favourable. (p 419 d-f)

h

i

- a** [2] The exclusion clause did not apply because there was no evidence adduced by the appellant that the insured had symptoms of cancer prior to 14 November 1996, the date the supplementary contract was issued. Further, in the event of an ambiguity, it should be resolved in favour of the respondent because the appellant had proffered the supplementary contract. On the facts, the respondent had proved the claim for the hospitalisation expenditure and the appellant was liable in respect of the payment of the charges. (pp 420 d & 421 b)
- b**

Case(s) referred to:

- c** *Chin Hooi Nan v. Comprehensive Auto Restoration Service Sdn Bhd* [1995] 1 BLJ 25 HC (*refd*)
China Insurance Co Ltd v. Ngau Ah Kau [1972] 1 MLJ 53 (*refd*)
Leong Kum Whay & Anor v. American International Assurance Co Ltd [1999] 5 CLJ 11 HC (*fol*)
Wong Swee Chin v. PP [1981] 1 MLJ 212 (*fol*)

d **Legislation referred to:**

Insurance Act 1963, s. 15C(4), (4A)

For the appellant - Andrew Khoo; M/s Khoo & Sidhu

For the respondent - N Shanmugam; M/s Shan & Gooi

- e** *Reported by Suresh Nathan*

JUDGMENT

Faiza Tamby Chik J:

- f** The learned magistrate gave judgment for the respondent for RM10,000 being the sum insured on a life policy issued to the deceased, the respondent's son and RM13,545.39 cents being the medical expenses on the supplementary contract to the life insurance policy. In the court below the appellant raised 2 substantive defences, as it does here, and the learned magistrate took note of them in the grounds of decision (see p. 7B to 8A of the Record of Appeal (RA)). Briefly, the 2 defences are:
- g**

(a) the deceased answered "Nil" to a question in the proposal form on the total amount of insurance as the proposer's life (see p. 112 of RA) when there was in existence a life policy for RM25,000 from the Great Eastern Assurance Co. Bhd.

- h** (b) the exclusion clause in the supplementary contract did not cover hospitalisation charges incurred as a result of any pre-existing condition or illness the symptoms of which first occurred prior to the issue date of this supplementary contract.

i

The appellant contends that as the deceased (the policy holder) did not disclose that he had already had a life insurance policy with the Great Eastern Assurance for RM25,000 in his proposal form the appellant was not bound to pay the respondent. The appellant relies on the majority decision of the Federal Court in the case of *China Insurance Co. Ltd. v. Ngau Ah Kau* [1972] 1 MLJ 53 (hereinafter referred to as the *China Insurance* case). In that case it was said at p. 55 para C right hand column:

In my view, therefore, once it is established that the truth of the answers to questions 6(A) and (B) is a condition of the contract, it is not open to the judge to consider the question of its materiality.

I must point out here that as from 1 August 1983 that situation has changed pursuant to the amendment made to the Insurance Act 1963 (hereinafter referred to as the Act) by way of s. 15C(4) and (4A) through Act A546 which came into force in 1 August 1983. Briefly s. 15C(4) states that no life policy shall be called in question by an insurer on the ground that the statement was false unless the insurer shows that such statement was on a material matter. “Material matter” is defined in s. 15C(4A) as meaning “such matter, if known by the insurer, would have led to a refusal by the insurer to issue a life policy or would have led the insurer to impose terms less favourable”.

The proposals form was dated 29 October 1996 but the very first time the appellant questioned the policy on the ground that the deceased had another life policy for RM25,000 was when the appellant filed its defence on 5 August 1999 and this was more than two years and nine months after the date of the proposal form. Therefore, that s. 15C(4) and (4A) of the Act applies in our case and the appellant had failed to prove that the deceased’s failure to disclose the existing life policy was a “material matter”.

In the case of *Leong Kum Whay & Anor. v. American International Assurance Co. Ltd.* [1999] 5 CLJ 11, the learned High Court Judge dealt with s. 15C(4) of the Act. The learned judge said “to my mind, the only issue for my consideration is whether the provision of s. 15C(4) of the Act applies” and quoted the section in extenso. He then made a finding that the 1st policy for consideration in that case cannot be called in question unless the defendant shows that the statement alleged to be false was on a material matter and the defendant there failed to prove the required ingredients. I think in this case the appellant had failed to prove the required ingredients of s. 15C(4). The appellant had failed to show evidence that if it had known that the statement was false it would have refused the proposal or would have imposed terms less favourable. I think pursuant to the *China Insurance* case whether or not the statement is material to the risk insured is no longer an issue and not

- a* tenable in view of s. 15C(4) and (4A) of the Act 1963. There is no ambiguity or controversy in s. 15C(4) and (4A) and its provisions are quite clear. The case of *Leong Kum Whay* cannot be said to be in conflict with the *China Insurance* case because ss. 15C(4) and (4A) upon which it was decided were not in existence when the *China Insurance* case was decided. Similar provisions also do not seem to have existed then.
- b*

- On the claim for hospitalisation expenses of RM13,545.39 cents which was allowed by the learned magistrate the appellant contends that the exclusion clause in the supplementary did not cover hospitalisation charges incurred as a result of illness the symptoms of which first occurred prior to the issue date of the supplementary contract (see p. 43 of the Record of Appeal).
- c*

- In this case the appellant relies on the evidence of SD1 Dr. Arul and submits that the insured had symptoms of a pre-existing illness, namely cancer, prior to the issue of the supplementary contract, ie, 14 November 1996 (Insured saw Dr. Arul for the 1st time on 11 November 1996). The exclusion clause does not apply because there is no evidence adduced by the appellant that the insured had symptoms of cancer prior to 14 November 1996. The evidence of SD1 under cross-examination shows:
- d*

- (a) To a suggestion that SD1 would not know that the insured was suffering from cancer as on 11 November 1996 SD1 replied in the affirmative by saying “yes” (see p. 69A of RA);
- e*

- (b) The witness also answered in the affirmative to a question that a patient would not know he was suffering from cancer until a doctor diagnosed him as having cancer (see p. 69C of RA);
- f*

- (c) SD1 said that non-hodgkin’s lymphoma means cancer (p. 66C in RA) but when he was asked why he did not mention that in his report he said it was impossible for him to know it was non-hodgkin’s lymphoma (see p. 70A of RA);
- g*

- (d) To another question whether cancer develops fast SD1 replies “months is most probable”. Again he repeated that patients had no way of knowing they have cancer until a doctor diagnose it (p. 70C of RA).
- h*

Therefore the evidence of SD1 shows:

- (i) The appellant had not shown any proof that cancer pre-existed in the insured;
- (ii) SD1 did not say that there were symptoms of cancer in the deceased;
- i*

(iii) There is no evidence that symptoms of the insured's pre-existing cancer had occurred prior to 14 November 1996. As a matter of fact SD1 did not know what illness the insured was suffering from. a

The operative words of the exclusion clause are, in this case, that the symptoms of cancer first occurred prior to the issue date and the hospitalisation charges were incurred as a result of a pre-existing cancer. I think in the event of an ambiguity it should be resolved in favour of the respondent because the supplementary contract was proffered by the appellant. Exclusion clause in the supplementary contract does not apply and the appellant is liable to pay the hospitalisation charges. It is noted that the receipts for the hospitalisation charges were marked as ID and the makers were not called and as such the appellant contends that the learned magistrate erred in allowing the claim for RM13,549.39 cents. The receipts for the payment of RM13,545.39 cents are in the agreed bundle but "subject to cross-examination". I think when the documents are in the agreed bundle there is no need to prove them and they require no proof by the makers. Although the makers were not called and the authenticity was accepted the court could treat them as exhibits since they are in the agreed bundle (see the case of *Chin Hooi Nan v. Comprehensive Auto Restoration Service Sdn. Bhd.* [1995] 1 BLJ 25). Although the receipts were agreed subject to cross-examination the plaintiff was not cross-examined on the receipts. The appellant did not call any witness to rebut the receipts. It was held in the case of *Wong Swee Chin v. PP* [1981] 1 MLJ 212 that a failure to cross-examine a witness on a crucial point amounts to the acceptance of the testimony of the witness. For this reason the respondent has proved the claim for the hospitalisation expenditure. In the premise the appeal is dismissed with costs and the decision of the magistrate is hereby upheld. b
c
d
e
f

g

h

i